

NOT FOR PUBLICATION

JAN 24 2008

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES HENDERSON,

Defendant - Appellant.

No. 07-30057

D.C. No. CR-06-00074-001-RSM

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

James Henderson appeals from the 74-month sentence imposed following his guilty-plea conviction for bank fraud, in violation of 18 U.S.C. § 1344, and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

aggravated identity theft, in violation of 18 U.S.C. § 1028A. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate and remand.

Henderson contends that the district court abused its discretion by applying a two-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(2)(A), because the offense involved ten or more victims. We agree. The plain language of the commentary to § 2B1.1 precludes counting an individual as a victim where, as here, that individual suffered no monetary loss. *See* U.S.S.G. § 2B1.1, cmt. n.1, 3(A)(i), 3(A)(iii); *United States v. Stinson*, 508 U.S. 36, 44 (1993) (explaining that commentary provides authoritative interpretation as to meaning of Sentencing Guidelines). Because the district court erred in calculating the applicable advisory Guidelines range, we vacate and remand for resentencing. *See United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006).

Because we are remanding, we need not consider Henderson's ineffective assistance of counsel claim.

VACATED and REMANDED.